United States Department of Energy
Office of Hearings and Appeals

In the Matter of the Washington Examiner	)	
	)	
Filing Date: May 24, 2013	)	Case No.: FIA-13-0033
	)	

Issued: June 10, 2013

Decision and Order

On May 24, 2013, the Department of Energy (DOE) Office of Hearings and Appeals received an Appeal of a determination issued to the Washington Examiner (Appellant) by the Office of Information Resources (OIR) on May 7, 2013 (Request No. HQ-2013-00211-F). In that determination, OIR released documents responsive to a request that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. One of those documents, which the Office of the Chief Financial Officer (CF) located and released, was redacted in part pursuant to Exemption 6 of the FOIA. 5 U.S.C. § 552(b)(6). This Appeal, if granted, would require CF and OIR to release information that they withheld pursuant to Exemption 6.

I. Background

The Appellant requested the following documents: "A database of all agency employees who have used 'official time' under any category in 5 USC 7131 or related statutes since January 1, 2009," and "Copies of any current master labor agreements between [DOE] and a labor organization/union which allow for official time under the previously referenced statute." *See* Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Mark Flatten (May 7, 2013). The request was assigned to CF to locate "records identifying employees serving as 'official time' personnel." CF located one document, and withheld the first and last names of employees pursuant to Exemption 6, stating that release of their names would invade a significant privacy interest and that their names "would not shed light on the operations of the government." *Id.* That document only reveals the following information: the UIC six-digit code, the organization's title, the labor date, hours documented as "official time," the payroll code, the local code and the local code description. OIR also provided nine documents in their entirety, which were responsive to the Appellant's request for labor agreements between various unions and DOE.

The Appellant contests CF's decision to invoke Exemption 6 to withhold the names of employees who have used their "official time." *See* Appeal. Specifically, the Appellant argues that the employees' names are in the public interest and are not "personal" in nature. The Appellant asserts that the Office of Personnel Management is "required to annually publish a report on the use of official time by federal agencies," and that "[t]his requirement recognizes that accounting for how public officials spend their time in the conduct of their official duties is the most basic information about the operations of government, and merits public scrutiny." *Id.* at 1. Thus, the Appellant is seeking information regarding the "use of 'official time' allowing federal officials to conduct business on behalf of labor organizations while receiving pay and benefits from their federal jobs." *Id.* at 2.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The term "similar files" was intended by Congress to be interpreted broadly, to include all information that "applies to a particular individual." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 595 (1982). Thus, as the records at issue identify agency employees who have used their "official time," for purposes of Exemption 6, they are "similar files."

Exemption 6 purports to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. *Id.* at 599-603. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep't of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

Here, the employees have a significant privacy interest in protecting their names from disclosure in the "official time" records. While the Appellant cites to the Department of Justice Guide to the FOIA, wherein it refers to the OPM Regulation listing personnel information that may be available to the public, the Regulation does not provide that personal information derived from timesheets – or documentation of "official time" used by agency employees – are public records. *See* 5 C.F.R. § 293.311 (a)(1)-(6) (listing the following information pertaining to federal employees as public: name; present and past position titles and occupational series; present and past grades; present and past annual salary rates; present and past duty stations; position descriptions, identification of job elements, and those performance standards that the release of which would not interfere with law enforcement programs or severely inhibit agency effectiveness). As the "official times" used by the employees are already provided in those records, disclosing the employees' names would consequently reveal the "official times" they reported working, which is not enumerated in the OPM Regulation as public information.

The United States District Court for the District of New Jersey provides useful guidance for our analysis. In *Berger v. I.R.S.*, the District of New Jersey considered a similar issue and concluded that disclosure of a federal employee's time sheets, "which are 'similar' personnel files, would constitute a clearly unwarranted invasion of her personal privacy." 487 F.Supp.2d 482, 505 (D.N.J. 2007). The court further concluded that disclosure of the time sheets would serve little to the public interest, and "certainly would not 'contribute[] *significantly* to public understanding of the operations or activities of the government." *Id.* Moreover, the United States Court of Appeals for the District of Columbia Circuit has previously held that federal workers have a substantial privacy interests in their names and hours worked. *See Painting and Drywall Work Preservation Fund, Inc. v. Department of Housing and Urban Development*, 936 F.2d 1300, 1302-03 (D.C. 1991). Likewise, we conclude that there is a significant privacy interest in the employees' names on the "official times" records as such information reveals how many hours each employee logged in as "official time" in their time and attendance reports. *See* Determination Letter.

Furthermore, there is a minimal public interest, if any, in revealing the names of the employees, as the names themselves hardly shed light on the government's activities. *See Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 193 (2d Cir. 2012); *see also Schwarz v. Dep't of Treasury*, 131 F.Supp.2d 142, 150 (D.D.C. 2000) ("Disclosures of these names could subject the individuals to unwanted harassment but would not contribute to the public understanding of government functions."); *Voinche v. F.B.I.*, 940 F.Supp. 323, 330 (D.D.C. 1996) (stating that the release of names and identifying features of federal employees would serve no articulable public interest). The Appellant argues that "[t]here is no way for the public to judge whether official time is 'authorized and used appropriately' without even knowing the names of the individual using it. Without this basic information, there is no way either labor or management can be held 'accountable to the taxpayer.'" Appeal at 2. Thus, the Appellant requests the employees' names in order to "fully inform the public as to whether [DOE] and the individuals it employs are using official time in a manner that is 'authorized and used appropriately.'" *Id.* However, it is uncertain the extent to which there is a public interest in the employees' names when the taxpayers can still be informed about the number of hours that federal employees documented as "official time" just by looking at the released information. As stated above, the released

information consists of the organization title to which the employee belonged, the date and hours that the employee worked on "official time," the payroll code, local code, and local code description, which lists the type of business that was conducted on behalf of a labor organization. The Appellant has not sufficiently explained how the employees' names are necessary to ascertain whether they have used their "official time" in a "manner that is 'authorized and used appropriately.'" Hence, in balancing the significant privacy interest against the minimal public interest, we conclude that release of the employees' names would constitute a clearly unwarranted intrusion of privacy. Accordingly, this Appeal will be denied.

III. Conclusion

It Is Therefore Ordered That:

(1) The Appeal filed by the Washington Examiner, Case No. FIA-13-0033, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 10, 2013